95-1404

Supreme Court, U.S.
FILED
FEB 2 1996
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHN R. ZIOMEK, D.P.M.,
PETITIONER

V.

THE CITY AND COUNTY OF SAN FRANCISCO,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN R. ZIOMEK, D.P.M.
PRO PER
145 SO. HALCYON RD. #A
ARROYO GRANDE, CA 93420
(805) 481-9100

93 pp

QUESTIONS PRESENTED FOR REVIEW

1. Federal Homestead regulations in most situations prevent alienation of claims prior to perfecting the patent. In this instant the Raker Act appears to be a Federal statute which allowed alienation of one's homestead application prior to perfecting the patent. The question which begs to be answered is what was allowed to be sold to San Francisco by an entrymen prior to his perfecting his claim under §§ 3 and 5 of the Raker Act.

2. The Federal Homestead patent issued to Caroline Martinez did not exclude the Right of way property sold eight years before by her deceased husband to the CITY. The CITY has asserted that with § 3 of the Raker Act that it was able to acquire fee title with the rights to the right of way through an entrymans claim. What was conveyed by the issuance of the patent to Caroline Martinez in 1924 with respect to the right of way sold to the City in 1916 by her deceased husband.

3. The Circuit Court reversed the lower courts ruling due to lack Federal jurisdiction. However it failed to consider the Executive order signed by President Woodrow Wilson limiting sales of properties to those necessary for for the CITY under the terms and Conditions of the Raker Act.

Does not the fact that an Executive order governed the sale confer Federal jurisdiction.

4. In quiet title actions one generally seeks relief in state courts. If an Executive order controls the absolute ability to buy, sell or occupy federal land, a Federal Statute allows one entity to purchase rights of ways over these federal lands and the Federal government issues a patent in conflict with the right of way, is not this a substantial Federal issue.

5. In order to interpret the interest conveyed by the entryman to the City one must determine whether the Raker Act creates a substantial burden on the plaintiffs respective property rights. The question therefore is if a Federal statute creates a controversy and that statute does not allow for a private cause of action, what constitutes "substantial" in lieu of Merrell Dow vs. Thompson.

6. This case falls within the guidelines of Cort vs. Ash.
The question therefore is whether this case falls within the four factors established in that decision.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1.Robert Tomei-Plaintiff

37 Warren, S.F. 94131

2.David S. Mana,-Plaintiff

137 Warren, S.F. Calif 94131

3. Jeffery J. Gottelli-Plaintiff

52 Zoe Street, S.F. 94107

4. Kathy Moore-Amicus Curiae

P.O. Box 76, Big Oak Flat, Calif.

The Petitioner and Respondent are listed on the Cover Sheet and were also parties to suit in the Court Below.

TABLE OF CONTENTS

PAGE

Questions Presented for review.....i-ii

List of Parties to the Proceedings in the Court Below.....iii

Table of Authorities.....vi-vii

Opinions Below.....2

Statement of Jurisdiction.....2

Constitutional Provisions, Treaties, Statutes, Rules & Regulations involved.....2

Statement of Case

a.What could an Entryman sell under Raker Act and Homestead Laws.....3-8

b.What did the Homestead patent grant.....8-11

c.What effect did Executive order have on the Patent.....11-12

d.What was the cumulative effect of the Raker Act,The Homestead and the Executive Order.....12-17

e.Merril Dow Pharmaceutical....18-19

TABLE OF CONTENTS-CONT.

f.Cort vs. Ash.....19-22

Reasons for Granting Writ.....23

Conclusion.....23

Appendix

A. United States Court of Appeals,
For the Ninth Circuit
Memorandum
Filed September 25,1995.....App 1-6
Judgement
Filed November 16,1995.....App 7-8

B. U.S. District Court,
Eastern District of California

Order Granting in part/
Denying in Part Defendants'
Motion to Dismiss
Filed November 5, 1992.....App 9-12

Memorandum Opinion and Order
Re: Cross Motions For Summary
Judgement
Filed May 20, 1993.....App 13-30

Memorandum Opinion and Order
RE:Plaintiffs' and Defendant's
Motions For Summary Judgement
Filed January 19,1994.....App 31-56

Judgement
Entered February 2, 1994.....App 57-60

C. United States Court of Appeals,
For the Ninth Circuit

Order
Filed November 6, 1995.....App-61

TABLE OF AUTHORITIES

CASES PAGE

Anderson vs Carkins
(1989) 135 US 483,489,
10 S.Ct.905, 34 L.Ed.272,275.....9

Cort vs. Ash (1975)
422 U.S. 66, L Ed. 2'd 26
95 S. Ct. 2080.....19

Franchise Tax Board vs. Construction
Labors Vacation Trust (1983)
463 U.S. 1, 77 L.Ed. 2'd,
420 103 S.Ct. 2841.....14

Merrell Dow Pharmaceutical vs.
Thompson (1986) 478 U.S. 804
L Ed. 2'd 704.....18

Northern Pacific Railroad Co. vs.
Trodick (1911) 221 U.S. 208,
55 L Ed. 704.....17

Schulthis vs. McDougal
225 U.S. 561, 569-570.....6

Smith vs. Kansas City Title & Trust
(1921) 255 U.S. 180, 65 L. Ed. 577,
41 S. Ct. 243.....12

United States vs. Clark
529 F. 2'd 984 (9'th Circuit).....9

TABLE OF AUTHORITIES-CONT.

FEDERAL STATUTES PAGE

Homestead Act 43 U.S.C § 141.....2,4,10

§ 2288(U.S. revised Stat.).....5,8

§ 2291(U.S. revised Stat.).....5

Raker Act (38 Stat. 42)
Section 1.....3
Section 3.....3,4,6,8,20
Section 5.....3,4,7,8,10,17,21,22
Section 9(u).....17
Raker Act 2,12,13,14,19,22,23

Executive Orders:

Executive Order #1887
President Woodrow Wilson
(1-31-14).....2,12

Constitution

Fifth Amendment.....15

Appellants Excerpt of Record
Volume 3,.....9,10

§1-381 Access to District Courts
Federal Procedure, L.Ed.....11

Congressional Reports-
1913- Senate page 355.....14,15
Senate page 357.....15,16,18

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN R. ZIOMEK, D.P.M., Petitioner

v.

THE CITY AND COUNTY OF
SAN FRANCISCO,
Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

John R. Ziomek, D.P.M., the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the ninth Circuit, entered in the above-entitled case on September 25, 1995. Petition for rehearing denied November 6, 1995.

OPINIONS BELOW

THE SEPTEMBER 25, 1995 opinion of the Court of Appeals, whose judgement is herein sought to be reviewed, the decision was unpublished (No.94-15360:Sept 25,1995) and is reprinted in the separate Appendix to this Petition.

The prior opinion of the United States District Court for the Eastern District of California, entered on February 2, 1994. This decision was unpublished (CVF 92-5168-OWW: Feb.2,1994) and is reprinted in the separate appendix to this petition.

STATEMENT OF JURISDICTION

The judgement of the Court of Appeals was entered on September 25, 1995. A petition for rehearing was filed on Oct. 10, 1995. The petition for rehearing was denied on November 6, 1995. The jurisdiction of this court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

1. The Raker Act: December 19, 1913 (38 Stat. at L. 232, chapter 4).
2. The Homestead Act 43 USC § 162 et. seq. (revised § 2289)
3. Presidential Executive Order #1887 President Woodrow Wilson:Jan. 31, 1914.

STATEMENT OF THE CASE

The basic issue in this case is what the nature of the property interest was that San Francisco was granted by the government under the terms of the Raker Act. The Raker Act in § 5 refers to the right of way as an easement. San Francisco, however, erroneously believes the sale of the Right of Way was a sale between two private parties and that the Raker Act does not apply. The City repeatedly admits in their briefs that it was § 3 of the Raker Act which allowed them to acquire title to the Right of way.

The District Court found that "Elias Martinez validly transferred an interest in his claim to San Francisco, the nature of the property interest must be determined." (p.10).Memorandum(5-20-93)

The District court went on to state... "It is necessary to observe that two transactions occurred: Martinez sold San Francisco rights to his claim and The United States granted San Francisco a Right of Way over the land. Martinez could not transfer title in the property, since, as he was an entryman, ownership was retained by the United States." Memorandum-May 20, 1993 (OWW)

The Court went on to state that the nature of what Martinez sold to the City was irrelevant to the question of what San Francisco was granted from the Government. (Raker Act § 1)

The District Court found jurisdiction under Federal Homestead laws (43 USC § 161 et. seq.). It also went on to say that resolution of the case would require interpretation of the Homestead laws, but not necessarily the Raker Act. San Francisco repeatedly asserts its belief that under § 3 of the Raker act it could buy in fee the Right of Way. It denies that § 5 has anything to do with this property. Martinez, at a later date, had two mines segregated off his original claim and the government today owns these mines. The very same Right of Way over private and federal land is interpreted as an easement and fee title respectively.

The resolution of the dispute between the two parties cannot be resolved by locking toward State Law for guidance. The respective rights to real property arise directly out of the Raker Act and the Federal Homestead Laws which were in effect in 1913. Both parties respective rights to the property in question turn on the interpretation of two federal statutes and an Executive Order.

In this case, the plaintiff, owns real estate, whose predecessor in interest Mr Martinez sold to San Francisco the Right of Way in question. Mr. Martinez was an entryman in 1916 when he sold the

Right of Way. He died in 1919 and never perfected a patent to the property. His widow Caroline Martinez was issued a patent in 1924 in her own name.

Federal Homestead regulations in general do not allow for alienation of ones claim prior to issuance of the patent. Mrs. Martinez was issued a patent under § 2291 of the Homestead Act. This Act in its pertinent part states the following:

> ..."*and makes affidavit that no part of such land has been alienated, except as has been provided in section twenty-two hundred and eighty-eight,...*"

§ 2288 states the following:

> "*Any bona fide settler under the preemption, homestead or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery or school purposes, or for the right of way for railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim..*"

As pointed out by the District Court, this section did not authorize the entryman to

sell fee title to the City for the Right of Way. The only plausible method that this sale could be considered legal would have been under § 3 of the Raker Act which authorized the sale of pre-existing claims for the necessary Rights of Ways. The sale of the Right of Way is not what is being contested but rather what was sold i.e. fee title, limited fee, or easement.

> A quiet title action arises under Federal law if it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends
> Schultis v. Mcdougal
> 225 U.S. 561, 569-570

One must look to the statute that creates the ambiguity for guidance.

The Raker Act; Section 3:

> **That the Rights of Way hereby granted shall not be effective over any lands upon which homestead, mining or other existing valid claim or claims shall have been filed or made and which now constitute prior rights to any claim of the grantee until said grantee shall have purchased such a portion or portions of such Homestead, mining or other existing valid claims as it may require for Right of Way purpose and other purposes herein set forth, and shall have procured proper relinquishments of such portions or**

> **portions of such claims, or acquired title by due process of the law and just compensation paid to said entryman or claimant, and caused proper evidence of such fact to be filed with the commissioners of the general land office, and the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted: Provided however, that this Act shall not apply to any lands embraced in Rights of Way heretofore approved under any Act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.**

Section 5 of the Raker Act very clearly states that:

> ***"That all lands over which the rights of way mentioned in this Act shall pass shall be disposed of only subject to such easements:"***

In order for Mrs. Martinez to have received her patent, she had to sign an affidavit stating she had not alienated the claim. She was given a patent without any acreage being deducted for the Right of Way crossing her property. The General Land Office records reflect the existence of the Right of Way on the plot maps and the homestead application of Mr. Martinez.

This quiet title action is brought because both parties contest the ownership of the Right of Way property. Both parties dispute the meaning of section 3. Both parties dispute the effect of the law in section 5. The plaintiff does not seek cancellation of the instrument but rather an interpretation by a Federal Court as to what was authorized by the Raker Act to be sold in lieu of Sections 3 and 5 of the Raker Act. The fundamental question therefore is whether or not the deed of right of way constitutes a prior alienation of her claim as set forth in the Homestead laws or the right of way is nothing more than easement as set forth in section 5 of the Raker Act.

2. As pointed above the Homestead did not allow for alienation of ones claims prior to receiving ones final certificate unless authorized by § 2288. If the patent was issued and the City's contention is right that they acquired fee title to this land, then the validity of our patent is in question. In the Appellate Court San Francisco has referred to our patent as a junior patent to their Deed of Right of way.

The City, in District Court stated...

> *"You know, the City agrees that under normal homestead law, a homesteader cannot sell any interest in the property prior to the issuance of a patent. That's the ANDERSON versus CARKINS case. The only answer that makes any sense to me is that Congress intended to vest the entrymans right prior to the issuance of a patent in order to allow sales to San Francisco. If you read it any other way the right to sell language in Section 3 is rendered meaningless."*
> (AER p. 33-34, Volume 3)

The CITY believes that it's possessory right to the land occurred with the sale of the Right of Way from Martinez and the subsequent filing of the Right of Way at the General Land Office.

The City attorney went on to say;

> *" Now I looked at the entire legislative history as I say, I saw nothing to connect Section 5 to section 3. And I think it's clear in my mind that San Francisco acquired it's title not from the United States but directly from Elias Martinez. San Francisco's title vested as soon as our map was filed and the deed of relinquishment from Elias Martinez was filed at the General land office.*

The subsequent patent in 1924 cannot have conveyed any interest, since the case cited by the City, patent could not effect lands previously disposed of. And I think the sale to San Francisco was a disposal of Federal lands pursuant to Section 3 of the Raker Act. That's what makes this case unique, and that 's what distinguishes it from patent law issues we have been discussing here."
(AER p.36, Volume 3)

Such an interpretation by the City flies in the face of the Ninth Circuit's own decision concerning ownership of Federal lands;

> ***"Legal title remained in Government but as against all except the United States, applicant was vested with all incidents of fee simple title when she entered."***
> United States vs. Clark
> 529 F.Ed. 2'd, 984(9'th Circuit)

This theory ignores the Homestead laws, violates the integrity of the patent which was issued to Mrs. Martinez eight years after the deed Right of Way was signed by her husband in 1916.

The CITY has referred to the plaintiff's patent as a junior patent in briefs submitted to the Appellate court. However, it is the CITY who cannot produce a patent!

It is this contorted reasoning and manipulation of a Federal Statute that begs a Federal Court to intervene.

3. All executive orders based upon federal statute confer federal jurisdiction.

> ***"presidential executive orders issued pursuant to statute are laws of the United States so as to confer federal jurisdiction of cases arising under such orders!"***
> 1:381 Access to District Courts; Federal Procedure, L.Ed.

On January 31, 1914, President Woodrow Wilson signed Executive Order No. 1887.

> ***"It is hereby ordered that all the public lands of the United States, in the State of California, situated within the limits as below described, be and the same are here by withdrawn from settlement, location, entry, or sale until otherwise directed, and are reserved for the purposes contemplated by the Act of December 19, 1913 (public No. 41)."***
> T. 1S.,R16E, M.D.M., § 19-34, inclusive.

The property in question is in Township 1S., Range 16 East, Mount Diablo Meridian, Section 20.

The Circuit court ignored this Executive Order when considering jurisdiction. Since the Executive Order was controlling as to what could be sold, this alone should confer jurisdiction as arising under.

4. If the Raker Act did not happen and President Woodrow Wilson did not issue an executive order and the patent had excluded the land in the right of way from the patent than the quiet title proceedings should be in State Court. However this is not the case. The Raker Act is an essential component in determining the validity of the deed in question. It is the "key ingredient" in determining whether San Francisco has merely an easement or if it has fee title to the right of way.

> ***"in formulating the correct rule, the Supreme Court quoted Marshall's outcome-determinative test and said that federal question jurisdiction exists where it appears from the plaintiff's bill or statement that the relief depends on the construction or application of the Constitution or the laws of the United States, and the Federal claim is not merely colorable but rests on a REASONABLE foundation."***
> Smith v. Kansas City Title & TrustCo. (1921) 225 U.S. 180,65 L.Ed. 577 41 S.Ct. 243

In plaintiff's first amended complaint, 2nd Cause of Action, it is stated that ***"said deed was given pursuant to the Raker Act, (Public Law No. 41) enacted December 19, 1913, 38 Stat. 242 and conveyed only an easement..."***

In the 3rd Cause of Action, it is stated that this court has jurisdiction over the subject matter of this action pursuant to U.S.C. § 1331. Further it is stated,

"There is now existing between the two parties hereto an actual, justifiable controversy in respect to which plaintiffs are entitled to have a declaration of its rights and further relief because of the facts, conditions and circumstances hereinafter set out."
An actual controversy has arisen, and now exists, between defendants, San Francisco AND THE United States, and plaintiffs concerning their respective rights and duties in that plaintiffs contend that the deed of Right of Way described in Paragraph 32 above is invalid, and, nonetheless, only an easement to the property described therein by reference to a "right of way" to the San Francisco pursuant to the Raker Act, and, in any event, the property was forfeited by San Francisco to the United States or to the plaintiffs pursuant to the Raker Act.

Plaintiff's desire a judicial determination of their rights and duties, and a declaration as to whether the Right of Way is valid, whether the deed conveyed fee title or an easement to the defendant San Francisco and whether or not the property has been abandoned or forfeited by San Francisco to the United States or to the Plaintiffs.

> Federal question jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that the Federal law creates the cause of action or that the plaintiff's right to relief neccessarily depends depends on resolution of a substantial question of Federal law, in that Federal law is a neccessary element of one of the well pleaded claim.
> Franchise Tax Bd. vs. Construction Laborors Vacation Trusts (1983) 463 U.S. 1, 77 L.Ed. 2'd 420,103 S.Ct284

Analysis of Congressional intent is useful in determining if Congress intended to totally remove a third parties right to sue under the Raker Act in Federal Court.

> ***Mr. Borah**, "Mr. President, somewhat strangely an apprehension exists in the minds of some, a fear lest something said in or done under this act might operate to deprive them of any of the rights which they have thus acquired. But I am very sure that not only the*

lawyers but the laymen in this body will recognize on reflection that it is beyond thepower of Congress no matter what they might say in this bill or any other bill to take away from those people one jot or title of the rights which they have thus acquired."

"No, Mr. President, nothing we could do by this act will, as I say, in virtue of the fifth Amendment of the Constitution, in any manner affect, nor can it affect, the rights of these people. That amendment provides that- no person shall be deprived of his life, liberty or property without due process of the law. It is beyond the power of this legislature to take those rights away from them."

Senate-Congressional Record-1913 P. 355

The Senate Congressional record goes on to point out that it may be possible for a third party to sue under the terms of this Act:

"But Mr. president it is suggested that in as much as the farmers in the San Joaquin Valley are not parties to this contract they will have no right to sue upon it. The question as to when a party other than those making it may sue upon it is one that involves us in many technical distinctions raised by the courts. It is not possible to reconcile

decisions. Some courts will hold that a third party for whose benefit a contract was made, may sue under certain conditions, while another court will hold that under exactly the same conditions while he will not be entitled to sue.
Whether or not a farmer in the San Joaquin Valley may avail himself of the provisions of this contract between the Government of the United States upon one hand and of the City of San Francisco upon the other I do not deem it necessary at this time to debate. My own opinion about it is that they have the right and that any of them may come in under this Act, appeal to its provisions, ask the privileges it grants them and have those privileges enforced against the City of San Francisco by ***"ANY COURT IN THE LAND."***

1913- Senate-Congressional Record-p.357

The congressional record points to the need to protect entryman of their respective rights. On p. 357 of the Senate congressional record Section 3 of the Act was read out.

"I do not know that I clearly understood the Senator, but I gathered from him that under that language the rights of no one would be safe, except one who had

made final proof upon it. The senator may have overlooked the decision of the THE SUPREME COURT of the United States in the case of the Northern Pacific Railway Co.. against Trodick, reported in two hundred and twenty-first United States, in which it ruled that anyone who settles upon public lands intending to assert a homestead right to them, being a bona fide in the occupation of them for that purpose enjoys a "claim". It was undoubtedly to protect the assertion of such claims that this provision was incorporated into the bill, and I deem the language ample to protect them."
p.357 Senate Congressional Record-1913

It is clear after careful analysis of the congressional record that Congress never intended to have an aggrieved third party not be able to sue the City under the terms and conditions of the Raker Act. Provisions which were put in Under § 5 and § 9(u) of this Act clearly were put in so as to take the burden of a costly suit away from a private party.

They do not preclude a third party with a vested interest under the Raker Act from seeking restitution as Senator Borah puts it... *"In any court of the Land"*. Further it is asserted that this right to sue is your Constitutional right.

5. The Circuit Court utilized Merrell Dow Pharmaceutical versus Thompson(1986)(478 US 804, 92 l Ed 2d 650) as a means of invoking the arising under doctrine in reversing and remanding the District courts decision. This was a very narrow interpretation and one which needs to be examined. Does the Raker Act specifically exclude the possibility that a third party sue San Francisco. No it doesn't. As pointed out in argument above, congressional documents point to the fact that Congress thought unlikely that a third party would likely take on the City. Congress thought the United States Government best to watch over it's investment and keep the City honest.

They referred to the ***"weak litigant, a farmer of limited means"*** and San Francisco as a ***"great powerful municipal corporation with practically limitless resources as his antagonist."*** P. 357 Congressional Reports-1913-Senate

It should be pointed out that nowhere in the debates have I found any evidence that an aggrieved third party could not sue the CITY. It may not be too economically feasible or smart, but not excluded. On the contrary, the debates specifically elude to the right of the certain parties such as entryman who would have the right to enforce their rights "in any court of the land" if need be.

The Raker Act does not exclude the possibility of a private party from suing the CITY, it simply delegates enforcement responsibility to the Attorney General. So, to use Merrell Dow Pharmaceutical vs. Thompson case is inappropriate since Congress specifically did not exclude a private cause of action for a third party with a vested interest and openly discussed that very possibility.

6. A more appropriate case comparison should have been Cort v. Ash.(1975) 422 US 66, L.Ed 2d 26, 95 S.Ct.2080

In determining whether a private remedy is implicit in a Federal statute not expressly providing one, the relevant factors are:

1. Is the plaintiff one of the class for whose special benefit the statute was created;

2. whether there is any legislative intent, expressed or implied either to create or deny such a remedy;

3. whether it is consistent with the legislative scheme to imply such a remedy for the plaintiff; AND

4. whether the cause of action is one traditionally relegated to State Law, in an area basically the concern of the States, so it would be inappropriate to infer a cause of action based solely on Federal Law?

The plaintiffs predecessor in interest was an entryman whose rights were protected by the inclusion of § 3 into the Act. As such, the PLAINTIFF is of a class deserving protection under the same Statute.

The legislative history points to the fact that § 3 was put in specifically to **PROTECT THOSE WHO HAD PRIOR CLAIMS.**

On page 357 of the Senate debates there was a great deal of discussion as to why § 3 was put into the bill and the Senator states ***"It was undoubtedly to protect the assertors of such claims that this provision was incorporated into the bill, and I deem the language ample to protect them."*** The plaintiffs land still has the Right of Way running through it and the B.L.M. still lists it on their plot maps despite being abandoned for railroad uses 40 years ago.

Secondly, it also quite clear in the debates that a third party to the Raker Act could file suit against the City.

On page 355 of the Senate debates it is stated ***"that it is beyond the power of Congress no matter what they say in this bill or any other bill, to take away from those people one jot or title of the rights which they just acquired."***

Further, on in the same debates, the provisions of the Fifth Amendment are raised when discussing rights. (No person shall be deprived of his life, liberty, or property without due process of the law.)

> ***"It is beyond the power of this legislature to take those rights away from them."***
> P. 355 Congressional Records - 1913

Thirdly, it is consistently mentioned throughout the entire debates that the Right of way is nothing more than easement.

> ***"Section 5 provides that the Grant by the Federal government is an easement".***
> Page 3909 Congressional Record-House 1913

The Raker Act does not exclude the possibility that a private cause of action could be brought by an aggrieved third party.

The plaintiff simply wishes a Federal Court to interpret what was sold to the CITY in 1916 by Mr. Martinez. The fact that throughout the entire debates § 5 refers to the Right of Way as an easement, shows consistency and conformity in what the plaintiff seeks from this Court in interpreting the Statute.

Fourth and last is the question of whether the cause of action is one traditionally relegated to State Law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal Law. Quiet title actions generally are decided in State Courts. However, this action has little if anything to do with State Law. To analyze the question, one must look at two Federal Statutes (Raker Act and the Homestead Act) and the relationship of an Executive Order to make sense out of the problem. The essential ingredients are Federal not state. The Appellate Court called the Raker Act "Tangential" to the issue.
The Raker Act is the issue!

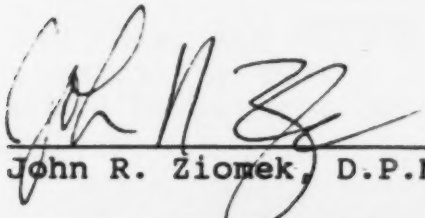
REASONS FOR GRANTING THE WRIT

The judgement of the United States Court of Appeals for the Ninth Circuit should be reviewed because it differs from the District Court ruling that the case did arise under Federal Statutes. This case does have standing in Federal Court. The Appellate Court too narrowly interpreted the "arising under" clause. The Raker Act does not preclude private parties standing in Federal Court. The Homestead Patent issued is clouded by a Right of Way authorized by Federal Statute. The Appellate Court should have used the Cort v. Ash decision for analysis of standing.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for writ of certiorari be granted.

Respectfully submitted,



1/31/96

John R. Ziomek, D.P.M. Date

145 So. Halcyon Rd. #A
Arroyo Grande, California 93420
(805) 481-9100

APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ZIOMEK, ROBERT A. TOMEI; DAVID S. MANA; JEFFREY J. GOTELLI;	)	No. 94-15360
	)	(D.C. No. CV-92-05168-WW)
Plaintiffs-Appellees,	)	
v.	)	(Filed September 25, 1995)
CITY AND COUNTY OF SAN FRANCISCO	)	
Defendant-Appellant,	)	
and	)	
CAROLYN J. JENKINS,	)	
Defendant.	)	

MEMORANDUM*

Appeal from the United States

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

App. 2

District Court for the Eastern District
of California
Oliver W. Wanger,
District Judge, Presiding

Argued and Submitted August 15, 1995
San Francisco, California

Before: FLETCHER, POOLE, and O'SCANNLAIN,
Circuit Judges.

We are asked to determine ownership of nine acres of non federal land. Before making such a determination, however, we must identify the source of federal jurisdiction over this claim.

Pursuant to 23 U.S.C Section 1331, the district courts are vested with original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States." A claim "arises under" federal law within the meaning of section 1331 if it is apparent from the face of the plaintiffs' complaint either (1) that a federal law creates the plaintiff's cause of action; or (2) if a state law creates the cause of action, that a federal law that creates a cause of action is a necessary element of the plaintiff's claim. See Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808-09 (1986).

This case does not fall within the first criteria for federal jurisdiction. John Ziomek et al. ("the Partners") did not allege in the district court that federal law created the cause of action that they have asserted. "Jurisdiction

may not be sustained on a theory that the plaintiff has not advanced." Id. at 809 n.6.

We are thus left to determine whether a federal law that creates a cause of action is an essential component of the Partners' state-law claim. See id. at 817. Our review of the record reveals two federal laws involved, however tangentially, in this matter: the Homestead Laws and the Raker Act. However, neither appears to satisfy the jurisdictional criteria of Merrell Dow.

Although it is true that title to the land at issue was derived originally from the federal Homestead Laws, this fact alone does not render the Homestead Laws an essential component of the Partners' claim. The Supreme Court has stated quite clearly that:

> [a] suit to enforce a right which takes its origins in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.

Shulthis v. McDougal, 225 U.S. 561, 569 (1912); see id. at 570 ("[A] controversy in respect of lands has never been

regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress."); see also Barnett v. Kunkel, 264 U.S. 16, 20 (1924) ("[T]he mere assertion of a title to land derived to the plaintiffs, under and by virtue of a patent granted by the United States, presents no question which, of itself, confers [federal question] jurisdiction." (quotations omitted)0; Hilgeford v. Peoples Bank, 776 F.2d 176, 178 (7th Cir. 1985) ("It is well settled . . . that a controversy regarding land has never been regarded as presenting a federal question simply because one of the parties to it has derived his title from a patent . . . . "), cert. denied, 475 U.S. 1128 (1986). Here, there is no dispute regarding the construction, effect or validity of the Homestead Laws. Rather, the debate centers around whether Martinez, a homestead entryman, conveyed fee title to San Francisco in his 1916 deed.

The Raker Act comes no closer to satisfying the jurisdictional requirements of Merrell Dow. Although the parties assert that construction of the Raker Act is essential to resolve the Partners' action, the Raker Act only becomes relevant because San Francisco has invoked it in defense. It is well established, however, that "[a] defense that raises a federal question is inadequate to confer federal jurisdiction."[1] Merrell Dow, 478

---

[1] For this reason, the cases relied upon by San Francisco in its supplemental brief are largely inapposite. See Supp. Brief at 4. In the majority of the cites

U.S. at 808 (emphasis added). The fact that the Partners anticipate San Francisco's defense, and thus address the relevance of the Raker Act in their complaint, does not save their action. "[W]hether a case is one arising under [federal law] . . . must be determined

---

cases, the Raker Act was a fundamental element of the plaintiff's complaint. See United States v. San Francisco, 310 U.S. 16 (1930) (suit by United States alleging that San Francisco had violated Section 5 of the Raker Act); Palo Alto v. San Francisco, 548 F.2d 1374 (9th Cir. 1977) (suit filed by localities contending that San Francisco had violated the Raker Act in setting water rates for such localities); San Francisco v. United States, 223 F.2d 737 (9th Cir.) (suit brought by United States contending that pursuant to Section 9(q) of the Raker Act, San Francisco was required to repay United States for expenditures for maintenance of Yosemite Park), cert. denied, 350 U.S. 903 (1955). In a fourth case, City and County of San Francisco v. United Airlines, 616 F.2d 1063 (9th Cir. 1979), cert. denied, 445 U.S. 964 (1980) Raker Act indeed appeared to arise in the context of a defense; however, because the case contains no discussion of jurisdiction, it is impossible to determine whether the case arose under diversity jurisdiction, or whether the court concluded that Section 1331 jurisdiction existed. And in the final case cited, Starbuck v. San Francisco, 556 F.2d 450 (9th Cir. 1977), the court concluded that there was no federal jurisdiction over the plaintiffs' action.

from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." Taylor v. Anderson; 234 U.S. 74, 75-76 (1914); see also Franchise Tax Bd. v. Construction Laborers Vacation Trust; 463 U.S. 1, 10 (1983) (no federal jurisdiction where complaint presents a state-law cause of action, but also asserts that a federal defense the defendant may raise is not sufficient to defeat a claim).

The mere existence of title in one of the parties derived from a federal land patent does not of itself confer federal question jurisdiction. Nor does the Raker Act, invoked by San Francisco in its defense, confer federal "arising under" jurisdiction. Accordingly, we reverse and remand to the district court to dismiss for lack of jurisdiction.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-15360
CT/AG#: CV-92-05168-OWW(DLB)

JOHN ZIOMEK; ROBERT A. TOMEI; DAVIS S. MANA; JEFFREY J. GOTELLI

Plaintiffs - Appellees

v.

CITY AND COUNTY OF SAN FRANCISCO

Defendant - Appellant

and

CAROLYN J. JENKINS

Defendant

- - - - - - - - - - - - - - - - -

KATHY MOORE, amicus

Amicus

JUDGMENT

(Filed November 16, 1995)

APPEAL FROM the United States District Court for the Eastern District of California (Fresno).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Fresno) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered September 25, 1995

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN ZIOMEK, ROBERT A. TOMEI; DAVID S. MANA; JEFFREY J. GOTELLI; Plaintiffs, vs. CAROLYN J. JENKINS, CASILDA JENKINS HALL, WARD A. HEUER, CITY AND COUNTY OF SAN FRANCISCO, JOHN ENGVALL, FIRST AMERICAN TITLE, a California Corporation, and UNITED STATES OF AMERICA, Defendants.	No. CVF 92-5168 OWW

ORDER GRANTING IN PART/DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS (FED. RULE CIV. PROCEDURE 12(b)(1))

(Filed November 5, 1992)

The motion of defendant City and County of San Francisco to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure, Rule 12(b)(1),

came on regularly for hearing before the Honorable Judge Oliver W. Wanger, on October 5, 1992. Defendants John Engvall, Ward A. Heuer, Carolyn Jenkins, Casilda Jenkins Hall and First American Title Insurance Company joined San Francisco's motion and urged the court to not exercise supplemental jurisdiction over said defendants pursuant to 28 U.S.C. Section 1367(c).

Plaintiffs were represented by Joseph Nieman, Esq. Defendant City and County of San Francisco was represented by Joshua D. Milstein, Esq. Defendants Engvall, Heuer, and Jenkins were represented by William m. Young, Esq., Gerald D. Vinnard, Esq. and Charles T. Taylor, Esq., respectively. After having considered the papers submitted by the parties and the argument of the parties at the hearing on this matter, it is hereby ORDERED as follows:

1. On September 22, 1992, defendant United States of America filed a disclaimer of interest in plaintiffs' real property which is adverse to plaintiffs, and the Court hereby confirms this disclaimer. The effect of this disclaimer is to deprive the court of federal question jurisdiction under the terms of the Federal Quiet Title Act (28 U.S.C. Section 2409a(e)). Defendant San Francisco's motion to dismiss is GRANTED as to the first cause of action against the United States and that portion of the third cause of action which pertains to the United States as a defendant under the 1913 Raker Act, 39 Stat. 242.

2. Pursuant to 28 U.S.C. Section 1367(c), the court declines to exercise

supplemental jurisdiction over defendants John Engvall, Ward A. Heuer, Carolyn Jenkins, Casilda Jenkins Hall and First American Title Insurance Company. These defendants' motions to dismiss as to the fourth, fifth, sixth, seventh, eighth, ninth, and tenth causes of actin in plaintiffs first amended complaint are GRANTED. Defendants John Engvall, Ward A. Heuer, Carolyn Jenkins, Casilda Jenkins Hall and First American Title Insurance Company are hereby dismissed from the above captioned action.

3. There is no federal question jurisdiction under the Raker Act. Plaintiffs have no private right of action under the Raker Act against defendant City and County of San Francisco. Defendant City and County of San Francisco's motion to dismiss is GRANTED as to those portions of plaintiffs' second, third and eleventh causes o faction which allege provisions of the Raker Act as the basis for relief sought by plaintiffs.

4. The court has jurisdiction against defendant City and County of San Francisco under federal homestead law (43 U.S.C. Section 161 et. seq.) regarding the validity of a 1916 deed from homesteader Elias Martinez to San Francisco. The court makes no findings as to the merits of plaintiffs' homestead law claims in this order. Defendant City and County of San Francisco's motion to dismiss is accordingly DENIED with respect to those portions of the second, third and eleventh cause of actions which allege right to relief under federal homestead law.

/s/ Oliver W. Wanger
The Honorable Oliver W. Wanger
Judge of the United States District Court,
Eastern District

SUBMITTED BY:

LOUISE H. RENNE
City Attorney
GEORGE E. KRUEGER
Utilities General Counsel
JOSHUA D. MILSTEIN
Deputy City Attorney
206 City Hall
San Francisco, CA 94102
(415) 544-4311

App. 13

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN ZIOMEK, et al.,	CV-F-92-5168 OWW
Plaintiffs,	
v.	
CAROLYN J. JENKINS, et al.,	
Defendants.	

MEMORANDUM OPINION AND ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Filed May 20, 1993)

Plaintiffs and Defendant City and County of San Francisco have filed cross-motions seeking summary judgment as to Plaintiffs' right to quiet title to a parcel of land in Tuolumne County, California which they purchased in 1986. The Court previously dismissed Plaintiffs' quiet title claim made against the United States, as well as damage claims made against the sellers, and a real estate broker, engineer and title company involved i the 1986 transaction. San Francisco remains the sole defendant in the case. Two causes of action remain: the second which seeks

quiet title against San Francisco and the third, to the extent it seeks declaratory judgment against San Francisco denying it a fee or easement interest in the property.

I. STANDARDS FOR REVIEWING MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate only "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. Anderson v. Liberty Lobby, 477 U.S. 242, 252-56 (1986). The non-moving party cannot simply rest on its allegation without any significant probative evidence tending to support the complaint. Id. at 249. Evidence submitted in support of or in opposition to a motion for summary judgment must be admissible under rules governing admission of evidence generally. Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 883 F.2d 1429, 1437 (9th Cir. 1989).

The more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be to avoid summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,

475 U.S. 574, 587 (1986). Nevertheless, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." Liberty Lobby, 477 U.S. at 255. The Court's role on summary judgment, however, is not to weight the evidence, i.e., issue resolution, but rather it is issue finding. Id.

II. BACKGROUND

The following facts are undisputed: In 1913, Congress passed the Raker Act which granted San Francisco rights of way over specified federal lands in furtherance of the Hetch Hetchy Water and Power Project. 38 Stat. 242 (1913). These rights of way could be used for various purposes, including canals, ditches, telephone lines, and railroad lines. Id. at Section 1. Section 3 of the Raker Act required that San Francisco purchase "such portion or portions of homestead, mining or other existing valid claims as it may require for right-of-way purposes" from the claimant. In 1914, President Wilson issued Executive Order No. 1887 which had the effect of prohibiting claimants of certain federal lands from selling their parcels to anyone besides San Francisco until San Francisco had acquired its necessary rights-of-way.

In 1912, The United States Land Office certified a Homestead entry application filed by Elias Martinez. In 1915, San Francisco filed a map with the Register of the General Land Office in

Sacramento showing the location of a "transportation road" to be used in the construction of the Hetch Hetchy project. In 1916, San Francisco and Elias Martinez executed a deed in which Martinez promised to "grant, bargain, sell and convey" a one hundred foot wide strip through a parcel of land. The deed was recorded in the Office of the County Recorder of Tuolumne County and filed with the General Land Office. The parcel is located in the area covered by the Raker Act, the executive order, and the map filed by San Francisco in 1915.

On February 15, 1919, Elias Martinez filed a Notice of Intent to prove up his patent with the Register of the General Land Office. On April 2, 1919, the owners of mining claims filed a contest to Martinez' Notice of Intention. On June 9, 1919, Martinez relinquished all portions of his homestead entry which were in conflict with the minim claims. Elias Martinez died in October, 1920. The Register of the General Land Office issued a Final Certificate of Homestead certifying that "Mrs. Caroline Lena Martinez, Widow of Elias Martinez, deceased, has made payment in full for 140.87 acres of land," which included the parcel in question. The certificate further stated that "Mrs. Caroline Lena Martinez, shall be entitled to receive a Patent for the land above described."

The interest in the parcel in question owned by Plaintiffs is identical to the interest owned by their predecessor-in-

interest, Caroline Martinez.[1]

---

[1] Documents submitted by the parties establish additional facts which, while a source of controversy between the parties, need not be considered to resolve this dispute:

In December, 1920, the Tuolumne County Clerk wrote a letter to the Register of the General Land Office in Sacramento stating that Elias Martinez had been killed and that his widow was seeking information as to the status of his application for final proof. The Register replied by letter, stating that the Sacramento branch of the Land Office had written to its main office in Washington on July 30, 1919, informing it that final proof had been made. The Register stated that he had received no reply from Washington and had written to inquire about the status of the claim.

A 1922 letter from the General Land Office in Washington replied to an attorney's request for information. The letter stated that "[i]t has been alleged that the entryman, who is deceased, submitted proof before he died, but said proof has not been received in this office, and if submitted has been mislaid or lost." A June 21, 1923 letter from the Washington office to the Sacramento office reiterated that the records of the Sacramento office showed Elias Martinez had submitted the requisite proof of entry and that the proof had been forwarded to the Washington office, but the records of the Washington office did not indicate that the proof was ever received.

III. DISCUSSION

The dispute centers around the validity and nature of the property right acquired by San Francisco in 1916. Defendant San Francisco contends that Elias Martinez' status as a homestead entryman was sufficient to transfer a

---

The letter then directed the branch office as to how to proceed in recording the claim. Three options were given: 1) if commissions were paid at the time of proof and receipt issued" the branch office was to "issue final certificate in favor of the entryman," however if the records did not indicate payment, then 2) Elias Martinez' widow could "reproduce the proof alleged to have been submitted" by elias and if adequate, the "patent will issue in his name" or 3) if the widow could not reproduce the proof, she may "submit proof in her own name and if the same be satisfactory final certificate would then issue in her name." The Final Certificate states that it was "authorized by letter 'C' June 21, 1923."

The Sacramento office's serial register book, under a caption headed "Elias Martinez," shows an April 9, 1919 entry "Receipt 2300282 for the $9.50, (illegible word) $3.50 susp. pending outcome of contest." The Final Certificate shows two receipt numbers. The first matches the receipt issued when Elias Martinez' entry was allowed in 1912. The second is 2300282, the receipt given Elias Martinez for paying a fee on April 9, 1919.

valid property interest to San Francisco. San Francisco further contends that a fee interest rather than merely an easement was transferred.

Plaintiffs contend that Elias Martinez' status as homestead entryman was insufficient to allow his conveyance of a property interest and San Francisco therefore acquired no interest in the property. Plaintiffs allege they possess an unclouded title, as the property passed unencumbered from the United States to their predecessor-in-interest, Caroline Martinez. Plaintiffs alternately contend that if Elias Martinez did convey a property interest to San Francisco, he conveyed an easement rather than a fee interest.[2]

A. The Validity of the Interest San Francisco Received From Elias Martinez

San Francisco concedes that generally under the Homestead laws, 43 U.S.C. Sections 161 et seq., an entryman could not alienate property to which he laid claim prior to the issuance of a patent, since such sales might encourage speculation. As the Homestead laws were intended to promote ownership by family

---

[2] Plaintiffs further contend that the easement has been abandoned through nonuse, yet concede that as the facts involving San Francisco's alleged abandonment are in dispute, the issue cannot be determined on a motion for summary judgment.

farmers, sales of a property interest prior to the entryman proving up his patent were voided by the courts as against public policy. See e.g., Anderson v. Carkins, 135 U.S. 483, 489 (1889). An entryman occupying public lands under the Homestead laws held only an inchoate right to acquire title by residing on the land or otherwise comply with the requirements of the Homestead laws. "Legal title remained in the government, but as against all except the United States, [the claimant] was vested with all the incidents of fee simple title when she entered." United States v. Clarke, 529 F.2d 984, 986 (9th Cir. 1976).

The Homestead laws provided two exceptions to the normal restraint on alienation.[3] 43 U.S.C. Section 174 allowed any "bona fide settler" to transfer any portion of his claim for the right of way of railroads or for "church, cemetery or school purposes."[4] 43 U.S.C. Section 171 allowed the executor of an estate to sell the land of any entryman for the benefit of the children if both parents died.

While San Francisco does not contend

---

[3] A judicially created exception also allowed entrymen to mortgage their property prior to receiving their patent. See 41 ALR 941.

[4] Section 174 is referred in the caselaw by its former designation, U.S. Revised Statute ("R.S.") Section 2288.

that either of these two exceptions apply, a third exception exists in the Raker Act. Section 3 of the Raker Act provides:

> That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining or the existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee[5] until said grantee shall have purchased portion or portions of such homestead, mining, or other existing valid claims as it may require for right of way purposes and other purposes herein set forth, and shall have procured proper relinquishments of said portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants and cause proper evidence of such fact to be filed with the Commissioners of the General Land Office and the right of such entryman or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted.

(emphasis added). The last clause of Section 3 gives an entryman the right to sell his interest in the claimed property

---

[5] I.e., San Francisco.

and San Francisco the right to buy it.

The undisputed evidence shows that in 1916, Elias Martinez transferred to San Francisco his rights to a 100-foot wide right of way. The Raker Act allowed Elias Martinez, even though he had not perfected his patent, to sell such an interest and San Francisco to buy it. The events that occurred after 19196, including Elias Martinez' death and the confusion over whether the patent was proved by Elias or Caroline, are of no importance. Caroline Martinez took the property subject to the interest which Elias Martinez sold to San Francisco.

Both parties agree that there is no case law interpreting conveyances under section 3 of the Raker Act. San Francisco cites by analogy a case interpreting the exception under 43 U.S.C. Section 174 for railroad rights-of-way, Pierce v. Chicago, Milwaukee and P.S. Railroad Co., 156 P. 127 (Montana 1916). In Pierce, an entryman quitclaimed a strip of land to a railroad. His entry was later canceled and the claim was patented by a third party who sued the railroad to clear title. The court held that, under the exception created by 43 U.S.C. Section 174, the conveyance to the railroad was valid. The Court reasoned that Congress intended to make the entryman the agent of the United States to convey the right of way to the railroad:

> That this was perhaps the intention is shown by the fact that all the purposes to be

> served by the conveyance are public, or quasi public, and it cannot be presumed that Congress overlooked the possibility that the entry of the settler might be canceled after contest or be abandoned, and the grantee left without protection from subsequent claimants. To illustrate: A grant is made of a small area for a community cemetery. If the grant is not effective to convey title, the subsequent cancellation or abandonment of the entry would restore the area to the public domain. The next entryman would be at liberty to respect or desecrate the resting place of the dead of the community, as his whim or caprice might prompt him. Such also would be the condition of the community school or church. So a railroad company would be left to his mercy, though it proceeded to construct its line under the justified belief that it had secured its right of way under its conveyance.

Id. at 129 (emphasis supplied).

The court alternately found that even if the entryman could not be seen as the government's agent and the property interest reverted back to the government, the railroad would be seen as having acquired a property right by grant at the time it originally filed its maps. Id. San Francisco would have a property

interest under this theory also, as it filed its maps, as required by the Raker Act, in 1915.

Cases cited by Plaintiffs do not support their position. Kansas Pacific Railway Co. v. Dunmeyer, 133 U.S. 629 (1885), contains no discussion of any exception to the general rule restraining an entryman's right to sell a property right. The case deals with an entryman who made a claim to land prior to a railroad filing a map, an act which would have otherwise entitled the railroad to ownership under a congressional land grant. The entryman failed to prove up his claim and the Court rules that the land did not revert to the railroad. Id. at 644.

A second case relied on by Plaintiffs, Alexander v. Kansas City, Fort Scott & Memphis Railroad Co., 138 Mo. 464 (1887), supports the proposition advanced by San Francisco. The case involved similar facts as in Pierce: an entryman had quitclaimed a right of way in favor of a railroad pursuant to 43 U.S.C. Section 174, yet had abandoned the claim without proving his patent. The court attacks the position that Plaintiffs adopt:

> To so construe [Section 174], with reference to such a condition of affairs as to hold that the railroad company must be punished by losing the money it paid Simpson, the homesteader, at the invitation of Congress, and be subjected to pay [a second homesteader] for the same

> right, and so on, ad infinitum, as often as they failed to comply with the law, would, in our opinion, be a fatal misconstruction of the [section], its intentions and purposes . . .
>
> We hold that when Simpson abandoned his homestead the lands became disburdened of his homestead claim, and the title of [the rail-road] to its right of way became at once perfect so far as the United States was concerned . . .

Id. at 472-73.

B. The Nature of the Property Interest Conveyed to San Francisco

Having concluded that Elias Martinez validly transferred an interest in his claim to San Francisco, the nature of the property interest acquired by San Francisco must be determined. Plaintiffs argue that an easement was acquired, while San Francisco maintains it received a fee interest. The parties disagree as to the proper body of law to be analyzed in determining the nature of the property interest. Plaintiffs argue that the language of the Raker Act is controlling,[6]

---

[6] Based on the arguments made by the parties on the motion to dismiss for lack of subject matter jurisdiction, a determination was made that resolution of the case would require interpretation of the Homestead laws, but not necessarily

while San Francisco contends that the deed signed by Martinez must be interpreted under state law.

It is necessary to observe that two transactions occurred: Martinez sold San Francisco rights to his claim and the United States granted San Francisco a right of way over the land. Martinez could not transfer title in the property, since, as he was an entryman, ownership was retained by the United States. United States v. Clarke, 529 F.2d 984, 969 (9th Cir. 1976). He could transfer only his priority rights to the land. This was a necessary act, as an entryman's rights were valid against all but the government. Id. Once this sale was accomplished, transfer of title occurred between the United States and San Francisco. Section 3 of the Raker Act provides, even in cases in which an entryman has laid prior claim to a parcel, that the right of way is

---

the Raker Act. As the Raker Act does not provide a private right of action, jurisdiction was found to be proper only under the Homestead laws. See Order of November 5, 1992. Defendant interprets this ruling as barring Plaintiffs from relying on the language of the Raker Act in this motion. This is a curious argument, as Defendant relies heavily on section 3 of the Act to prove its case.

As both parties now make clear, their cross-motions for summary judgment can only be resolved through interpretation of both the Homestead laws and the Raker Act.

transferred by grant from the government, not by sale by the entryman:[7]

> That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining or the existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased portion or portions of such homestead, mining, or other existing valid claims as it may require for right of way purposes and other purposes herein set forth, and shall have procured proper relinquishments of said portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants and cause proper evidence of such fact to be filed with the Commissioners of the General Land Office and the right of

---

[7] This conclusion is consistent with the holding in Pierce v. Chicago, Milwaukee and P.S. Railroad Co., 156 P. 127 (Montana 1916), in which the court determined that the entryman was the government's agent. The entryman did not hold title, but his act of selling his priority interest triggered the transfer of ownership from the government to the railroad.

> such entryman or claimants to sell and of such grantee to purchase such portion or portions of such claims are hereby granted.

The nature of the interest in the homestead claim sold by Martinez to San Francisco is irrelevant to the question of the nature of the interest San Francisco was granted.

The Raker Act provides that San Francisco was granted an easement interest. Section 5 states, in pertinent part:

> That all lands over which the rights of way mentioned in the Act shall pass shall be disposed of only subject to such easements. . . .[8]

The government was free to later divest itself of its fee title interest in the land, such as occurred when a patent was issued to Caroline Martinez, but the new owner took subject to an easement interest

---

[8] Section 5 also contains a proviso that San Francisco will forfeit to the United States its rights to the grant if it fails to construct the project in a diligent manner. San Francisco argues that section 5 is inapplicable to land transferred through private transactions with entrymen. As outlined above, ownership was transferred by the government.

held by San Francisco. The legislative history of the Act reflects that San Francisco was granted only an easement interest:[9]

> Section 5 provides that the grant by the Federal Government is an easement and that the lands shall be disposed of only subject to such easement.

H.R. Rep. No. 41, 63d Cong., 1st Sess., Cong. Rec. at 3909 (1913)

IV. CONCLUSION

San Francisco acquired a valid easement interest in the strip of land running through the Martinez property.

Defendant San Francisco's motion for summary judgment is GRANTED to the extent that Plaintiffs are not entitled to quiet

---

[9] After hearing of this motion, Plaintiff was granted leave to file portions of the legislative history of the Raker Act. Defendant declined the opportunity to file any additional legislative history (Defendant filed some of the legislative history prior to hearing). Defendant rightfully complains that Plaintiffs' post-hearing submissions went far beyond legislative history. A declaration, new documents, new case law, and a supplemental brief were filed. None of these additional papers have been considered.

title as against San Francisco and DENIED in all other respects.

Plaintiffs' motion for summary judgment is GRANTED to the extent that it seeks a declaration that the interest San Francisco acquired in the Martinez property was an easement and DENIED in all other respects.

Plaintiffs shall inform the Court within thirty (30) days of date of service of this order whether this litigation may now be concluded or if further relief will be sought.

SO ORDERED.

/s/ Oliver W. Wanger
Oliver W. Wanger
United States
District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN ZIOMEK, ROBERT A. TOMEI; DAVID S. MANA; JEFFREY J. GOTELLI; Plaintiffs, vs. CAROLYN J. JENKINS, CASILDA JENKINS HALL, WARD A. HEUER, CITY AND COUNTY OF SAN FRANCISCO, JOHN ENGVALL, and FIRST AMERICAN TITLE, a California Corporation, UNITED STATES OF AMERICA, Defendants.	No. CVF 92-5168 OWW

MEMORANDUM OPINION AND ORDER RE: PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

(Filed January 19, 1994)

INTRODUCTION

This action was brought to quiet title to plaintiffs' 140-acre parcel of land in Tuolomne County, California. Cross-motions for summary judgment have

been brought by the plaintiff and defendant City and County of San Francisco ("City"), for the second time.

BACKGROUND

In 1913, Congress passed the Raker act which granted the City rights of way over specified federal lands in furtherance of the Hetch Hetchy Water and Power Project. 38 Stat. 242 (1913). These rights of way could be used for various purposes, including canals, ditches, telephone lines, and railroad lines. Id. at Section 1. Section 3 of the Raker Act required that the City purchase "such portion or portions of homestead, mining or other existing valid claims as it may require for right-of-way purposes" from the claimant. In 1914, President Wilson issued Executive Order No. 1887, which had the effect of prohibiting claimants of certain federal lands from selling their parcels to anyone besides the City until the City had acquired its necessary rights-of-way.

In 1912, the United States Land Office certified Homestead entry application filed by Elias Martinez, for the parcel of land that is the subject of this litigation ("parcel no. 435"). In 1915, the City filed a map with the Register of the General Land Office in Sacramento showing the location of a "transportation road" to be used in the construction of the Hetch Hetchy project. In 1916, the City and Elias Martinez executed a "Deed of Right of Way," in which Martinez agreed for consideration paid to:

> . . . grant, bargain, sell and convey unto the said party of the second part and to its successors and assigns forever, all that certain piece or parcel of land. . . . [a] strip of land one hundred (100) feet side, fifth (50) feet on each side. . . . Together with the tenements, hereditaments and appurtenances thereunto belonging, or appertaining, and the reversion and reversions remainder and remainders, rents, issues and profits thereof. . . .

The deed was recorded in the Office of the County Recorder of Tuolumne County and filed with the General Land Office. The parcel is located in the area covered by the Raker Act, the executive order, and the map filed by the City in 1915. On January 4, 1917, a copy of the 1916 deed from Elias Martinez to the City was filed with the General Land Office.

On February 14, 1919, Elias Martinez filed a Notice of Intent to prove up his patent with the Register of the General Land Office. On April 2, 1919, the owners of mining claims filed a contest to Martinez' Notice of Intention. On June 9, 1919, Martinez relinquished all portions of his homestead entry which were in conflict with the mining claims. Elias Martinez died in October, 1920. In 1924, Caroline Martinez received a patent to the 140 acres from the United States.

In 1916, the City began construction of a transportation route for the

construction and maintenance of the O'Shaughnessy Dam. In 1950, the City removed railroad tracks that had run through parcel no. 435 across the subject property. In 1970, the City granted a revocable permit to the Groveland Community Services for the installation of six inch water main under the City's right of way.

Plaintiffs are successors-in-interest to Caroline Martinez, and filed this action to quiet title to the property.[1] The complaint asserts the following causes of action against the City:

> Second Cause of Action - Quiet title to the property, as the City held an easement across parcel no. 435, that has since been abandoned;
>
> Third Cause of Action - A claim seeking a declaratory judgment as to the nature of property interest granted from Elias Martinez to the City, as well as the current rights held by both the plaintiff and the City;
>
> Eleventh Cause of Action - To cancel the deed in which Elias Martinez purported to grant an interest in parcel no. 435 to the City.

On September 22, 1992, defendant United States of America filed a Disclaimer of

---

[1] The 140.87-acre property has since been subdivided into 6 lots.

Interest to the property, and was dismissed from the action. On November 5, 1992, defendants John Engvall, Ward A. Heuer, Carolyn Jenkins, Casilda Jenkins Hall and First American Title Insurance Company were dismissed, under discretionary authority granted by 28 U.S.C. Section 1367 to decline to exercise jurisdiction over predominantly state law claims. The City is the sole remaining defendant.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law placed on that party. Anderson v. Liberty Lobby, 477 U.S. 242, 252-56 (1986). The non-moving party cannot simply rest on its allegation without any significant probative evidence tending to support the complaint. Id. at 249. Evidence submitted in support of or in opposition to a motion for summary judgment must be admissible under rules governing admission of evidence generally. Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 883 F.2d 1429, 1437 (9th Cir. 1989).

The more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be

to avoid summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Nevertheless, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." Liberty Lobby, 477 U.S. at 255. The Court's role on summary judgment, however, is not to weight the evidence, i.e., issue resolution, but rather it is issue finding. Id.

IV. DISCUSSION

a) Legal Background: Transfers of Land under the Raker Act

Generally under the Homestead laws, an entryman could not alienate property to which he laid claim prior to the issuance of a patent, since such sales might encourage speculation. 43 U.S.C. Sections 161 et seq. As the Homestead laws were intended to promote ownership by family farmers, sales of a property interest prior to the entryman proving up his patent were voided by the courts as against public policy. See, e.g., Anderson v. Carkins, 135 U.S. 483, 489 (1889). An entryman occupying public lands under the Homestead laws held only an inchoate right to acquire title by residing on the land or otherwise comply with the requirements of the Homestead laws. "Legal title remained in the government, but as against all except the United States, [the claimant] was vested with all the incidents of fee simple title when she entered." United States v. Clarke, 529 F.2d 984, 986 (9th Cir. 1976).

The Homestead laws provided two exceptions to the normal restraint on alienation. 43 U.S.C. Section 174 allowed any "bona fide settler" to transfer any portion of his claim for the right of way of railroads or for "church, cemetery or school purposes." 43 U.S.C. Section 171 allowed the executor of an estate to sell the land of any entryman for the benefit of the children if both parents died. Neither of these is asserted here.

A third exception exists in the Raker Act. Section 3 of the Raker Act provides:

> That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining or the existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased portion or portions of such homestead, mining, or other existing valid claims as it may re-quire for right of way purposes and other purposes herein set forth, and shall have procured proper relinquishments of said portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants and cause proper evidence of such fact to be filed with the Commissioners of the General Land Office and the right of such entryman or claimants to

> sell and of said grantee to purchase such portion or portions of such claims are hereby granted.

(emphasis added). The last clause of Section 3 gives an entryman the right to sell his interest in the claimed property and San Francisco the right to buy it.

b) Law of the Case

On cross-motions for summary judgment previously filed by these parties, it was determined that: 1) Elias Martinez transferred his homestead interest as an entryman to a right of way to the City in the 1916 deed; and 2) the City held an easement interest in the property, as a result of the United States' transfer to the City pursuant to the Raker Act. The May 20, 1993 Opinion stated:

> It is necessary to observe that two transactions occurred: Martinez sold San Francisco rights to his claim and the United States granted San Francisco a right of way over the land. Martinez could not transfer title in the property, since, as he was an entryman, ownership was retained by the United States. United States v. Clarke, 529 F.2d 984, 969 (9th Cir. 1976). He could transfer only his priority rights to the land. This was a necessary act, as an entryman's rights were valid against all but the government. Id. Once this sale was accomplished, transfer of

> title occurred between the United States and San Francisco. Section 3 of the Raker Act provides, even in cases in which an entryman has laid prior claim to a parcel, that the right of way is transferred by grant from the United States. . . .

Based on section 5 of the Raker Act and its legislative history, it was determined that the United States granted an easement to the City.

c) Defendant City's Motion for Summary Judgment

The City offers additional legislative history, legal authority, documents and a newly presented legal theory to buttress its claim that it owns the property in fee.

1) Homestead Relinquishment

The City submits a list of deeds, easements and rights of way, compiled and prepared in 1937 by an electrical engineer for the Hetch Hetchy project. According to this document, the 1916 deed from Elias Martinez operated as a relinquishment of Martinez's homestead interest to the property.

A homestead entryman had no obligation to perfect a claim, but could relinquish or abandon the land prior to obtaining a patent. Great Northern Ry. v. Steinke, 261 U.S. 119, 127 (1923). A relinquished claim had no legal effect on a subsequent entryman or purchase of the

land. Id. By statute, written relinquishments were effective upon filing in local land offices. 43 U.S.C. Section 202 (repealed 1976). The City argues that common law provided that an attempted sale or conveyance of the land may be a second method of relinquishment. In Love v. Flahive, 205 U.S. 195 (1907), the U.S. Supreme Court affirmed the findings and decision of the Commissioner of the General Land Office, which had been affirmed by the Secretary of the Interior. The Court considered whether an entryman, who had conveyed property prior to obtaining a patent, could assert a superior interest to a subsequent purchaser. The Secretary had determined that, although the transaction did not transfer title to the purchaser, the sale was:

> . . . conclusive evidence that [the entryman] asserted, at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith estopped from asserting title against the vendee of the purchaser from him.

In affirming the Secretary's decision, the Court stated:

> It is objected by the plaintiff that a sale of a homestead prior to the issue of a patent is void under the statue of the United States. Anderson v. Carkins,

> 135 U.S. 483. That is undoubtedly the law, but the fact that one is seeking to enter a tract of land as a homestead cannot make a valid sale thereof is not at all inconsistent with his right to relinquish his application for the land, so the Secretary of the Interior ruled. While public policy may prevent enforcing a contract of sale, it does not destroy its significance as a declaration that the vendor no longer claims any rights. He cannot sell and at the same time deny that he has made a sale. The Government may fairly treat it as a relinquishment, an abandonment of his application and entry.

Love, 205 U.S. at 201-02. The Court found that, after an attempted conveyance the entryman had no remaining interest. Id. at 202. After that point,t he property's ownership was then "to be settled between the Government and other applicants." Id.

On petition for rehearing, the Supreme Court affirmed its prior holding:

> A sale made by a party who is 'in possession of a tract of public land with an intent thereafter to enter it as a homestead' is equivalent to a relinquishment of his right to enter, and the Department may properly treat as having no further claims upon the land. He may not sell and still have

> the rights of one who has not sold. He does not by merely continuing in possession create a new right of entry as against the party in whose favor he has relinquished his right.

Love v. Flahive, 206 U.S. 356, 357 (1907). Land Department decisions indicate that an attempted conveyance is considered "merely evidence of abandonment;" the determination is a factual one, considered "with other facts in his case." Wilson v. Holmes, 38 Int. Dept. Land Dec. 475, 479 (1910).

The City argues that by conveying the land in the 1916 deed, Elias Martinez: 1) relinquished his interest in the property in the 1916 deed, and; 2) transferred a fee simple interest to the City on behalf of himself and/or as agent for the United States. As authority, the City cites a discussion among senators considering the bill. 51 Cong. Rec. 287 & 357 (1914). There, in response to another senator's concern that entrymen would be without rights in the land transfers, Senator Walsh of Montana argued that entrymen possess a "claim" as it is referred to in section 3 of the Act, as defined in Northern Pacific Railway Co. v. Trodick, 221 U.S. 208 (1911). In Trodick, the Supreme Court held that an entryman had rights superior to a railroad that had been granted land by act of Congress in the Northern Pacific Land Grant Act of July 2, 1864, 13 Stat. 365, c.217, such that the entryman's subsequent sale of improvements on the land was valid. Id. at 211-12. Trodick relied on Bishop of Nequally v. Gibbon, 158 U.S. 155, 169

(1894), which found that entrymen, as "parties in possession of the soil might make valid contracts, even concerning the title, predicated on the hypothesis that they thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts."

The City argues that the asserted theory is consistent with section 3 of the Raker Act, which grants rights of way to the City, if the City:

> . . . purchased portion or portions of such homestead, mining, or other existing valid claims as it may require for right of way purposes and other purposes herein set forth, and shall have procured property relinquishments of said portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants and cause proper evidence of such fact to be filed with the Commissioners of the General Land Office. . .

In construing a somewhat similar provision in the Act of March 3, 1875, c. 152, 18 Stat. 482, the Supreme Court characterized the grantee's property interest as follows:

> [T]he grant was to be effective as against the United States, but was not to impair valid existing claims of settlers and others, and that to make the grant effective against such

> claimants their rights should be extinguished through their private negotiations or,. if need be, through condemnation proceedings.
>
> That [the entryman] had a valid existing right in virtue of his preliminary entry must be conceded. But it was only an inchoate right to acquire the title by residing on the land and otherwise complying with the homestead law for a prescribed period. The title and real ownership were in the United States. . . . Subject only to his claim, the approved map vested in the company a complete right to the track for station purposes. [The entryman] voluntarily relinquished his entry and thus put an end to his claim. Nothing then stood in the way of the company's right. It was as if [the entryman] voluntarily relinquished his entry and thus put an end to his claim. Nothing then stood in the way of the company's right. It was as if [the entryman]'s claim never existed.

Great Northern Ry v. Steinke, 261 U.S. 199, 126-27 (1922). That an entryman acts as an agent for the United States is conceptually inconsistent with the Steinke analysis, which rests on the theory of relativity of title, not agency. Nor does it support the proposition that the Raker Act expanded the entryman's right into a fee title. To the contrary, the City's

interest must still derive from the United States. Clark, 529 F.2d at 986.

The City relies on Pierce v. Chicago, Milwaukee and Pugent Sound Railway Co., 156 P. 127, 129 (Mont. 1916), which construed the Act of March 3, 1765, 17 U.S. Stat. 602, U.S. Rev. Stat. 228, it argues is analogous to the Raker Act. Pierce discussed that land transfers under the 1875 Act could operate in either of the following ways: 1) an agency relationship could exist between the entryman and the United States; or 2) land could be conveyed by the entryman's relinquishment of his interest and reversion of the land to the United States, who then transferred the land to a grantee. Pierce noted that it was irrelevant which theory was correct, because the result was the same under either. Pierce, 156 P. at 129. The agency discussion in Pierce was dictate. Nor did Pierce imply that the Act of March 3, 1875 could be construed to convey fee title to the entryman.

The conveyance of a fee simple cannot be reconciled with section 5 of the Act, which defines the interest conveyed as an easement. See also H.R. Rep. No. 41, 63d Cong., 1st Sees., Cong. Rec. at 3909 (1913) ("Section 5 provides that the grant by the Federal Government is an easement and that the lands shall be disposed of only subject to such easement."). The City argues that section 5 is limited to grants directly from the United States, and not from those whose rights are "vested" under section 3. But that argument defeats the system of transfer of ownership put into place by the Raker Act.

By granting "the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims . . . ," the Raker Act created an exception to the restraint on alienation for an entryman's interest. The principles discussed by Senator Walsh establish only that the entryman had an ability to receive compensation for the relinquishment of some property interest. The discussion in the Congressional Record, and related case authority, do not create in an entryman the power to convey a fee title interest. To do so would violate the principle that an entryman's "claim" cannot be a fee simple interest, because title to an entryman's property is retained by the United States. United States v. Clarke, 529 F.2d 984, 986 (9th Cir. 1976). The Raker Act provided a means for transfer of an entryman's interest before perfection of a land patent, but its language cannot be read to abrogate Homestead law by vesting entrymen with a fee simple interest before completion of all conditions required to perfect a federal homestead.

Here, Elias Martinez at most sought to convey to the city an interest in a portion of the disputed 140 acres, a 100-foot wide strip. He could not convey a fee in that right of way by virtue of the Raker Act, and his transfer to the City of a limited interest did not defeat his interest with respect to the United States, which could thereafter issue a patent to his surviving spouse upon satisfaction of all required conditions under the Homestead Law.

2) Estoppel

The City argues that, under the relinquishment theory, at minimum the plaintiffs, as successors-in-interest to Caroline Martinez, are estopped from seeking to assert any interest in underlying property under the abandonment theory. See Love, U.S. at 201-02; Love, 206 U.S. at 357.

The 1916 deed purported to convey "all that certain piece or parcel of land. . . . [a] strip of land one hundred (100) feet wide, fifty (50) feet on each side. . . . " running across parcel no. 435. Under the principles discussed by the Supreme Court in both Love v. Flahive cases, this may be probative, though not necessarily determinative, of Elias Martinez's intent to abandon an interest in that strip of land sufficient to relinquish all his rights to that property. The front cover of the Deed states it is a "Deed of Right of Way." See State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 506 (Mo. 1941) ("A right of way, in its legal and generally accepted meaning in reference to a railroad company's interest in land, is a mere easement for railroad purposes in the lands of others.") (citations omitted). The deed is ambiguous as to whether Elias Martinez intended to relinquish his entire entryman's right in all the land within the 100-foot strip, or merely a right of way (easement) interest. In Wilson v. Holmes, 38 Int. Dept. Land Dec. 475, 479 (1910), whether an entryman's right was relinquished by an attempt to convey was considered a factual issue, to be

considered with the other facts in this case. Cf. Love v. Flahive, 205 U.S. 195, 201 (1907) (discussing circumstances of sale as factual issue).

The party seeking the benefit of estoppel has the burden of proof. Vickars-Henry Corporation v. Board of Governors, 629 F.2d 629, 635 (9th Cir. 1980). At oral argument, the City stated that it had no further evidence to offer and was not interested a trial, nor a further evidentiary hearing. An affirmative defense must be proven by a preponderance of the evidence by the party asserting it. Dash v. National Labor Relations Board, 793 F.2d 1062, 1066 (9th Cir. 1986). The City bears the burden of clarifying the ambiguity in the 1916 deed, and has waived the right to present evidence on the issue. Evidence of an estoppel does not preponderate. Plaintiffs are not estopped from asserting an interest in the land.

3) Indian Allotment

The City argues that section 5 of the Raker Act does not limit grants of the United States to easements. As evidence, the City submits a document granting a permit to the City for a strip of land in a portion of the Hetch Hetchy right of way. The permit provides that, should the City repair some damage to the property, "a deed in fee simple by which the hereinabove described strip of land shall be deeded to the said City and County of San Francisco in such manner as shall be authorized and approved by the Secretary of the Interior" shall be delivered. The

strip of land was previously an Indian allotment, in the name of Tom Thompson.

In response, plaintiffs submit evidence demonstrating that acquisitions of Indian allotments are not governed by the Raker Act, but rather by the Act of June 25, 1910, 36 Stat. 855 (codified at 18 U.S.C. Sections 1853, 1856; 25 U.S.C. Section 47, 151, 202, 312, 331, 333, 336, 337, 351, 352, 353, 372, 373, 403, 406, 407, 408 as amended), see generally Cohen's Handbook Federal Indian Law 132-34 (1982). This amendment to the General Allotment Act provided for a method for the sale and transfer of Indian lands. Federal Indian Law, at 133.

The plaintiffs submit several letters to establish that the Tom Thompson transaction was not effected pursuant to the Raker Act. At oral argument, the City conceded that no basis existed to support its contention that the subject land was an Indian allotment. This argument need not be further considered.

d) Plaintiffs' Motion for Summary Judgment

1) Abandonment of the Easement

An easement acquired by grant can be abandoned by: 1) the acts of an owner "of a character so decisive and conclusive as to indicate a clear intent to abandon the easement," Gerhard v. Smith, 68 C.2d 864, 891, 69 Cal. Rptr. 612 (1968); or 2) for a period of twenty years immediately proceeding commencement of an action to establish abandonment, all of the following conditions are satisfied:

(a) The easement is not used at any time;

(b) No separate property tax assessment is made of the easement or, if made, no tax is paid on the assessment;

(c) No instrument creating, reserving, or otherwise evidencing the easement is recorded.

Cal. Civ. Code Section 887.050 (1985). Unless a provision falls within section 887.050, mere non-use without an intent to abandon does not terminate an express easement. Cal. Civ. Code Section 887.030;[2] Gerhard, 68 C.2d at 891. Because the City has paid taxes on the property during some portions of the last twenty years, the plaintiffs confine their arguments to the common law.

Under the common law, the length of nonuse is relevant to determine the existence of an intent to abandon. Id. at 893 (citing Ocean Short R.R. Co. v. Doelger, 179 Cal.App. 2d 222 (1960)). "[T]he intention with which an act is done is a question of fact, to be determined by the trial court or jury from a consideration of the conduct of the party and the surrounding circumstances." Id.

---

[2] Cal. Civ. Code Section 887.030 states in relevant part, "This chapter supplements and does not otherwise limit or otherwise affect the common law governing abandonment of an easement."

"The intention required in the abandonment of an easement is the intention not to make in the future the uses authorized by it." Faus v. City of Los Angeles, 67 C.2d 350, 363, 62 Cal. Rptr. 193 (1967); see also Tract Development Service, Inc. v. Kepler, 199 Cal. App. 3d 1374, 246 Cal. Rptr. 469, 477 (4th Dist. 1988) ("Abandonment hinges on the intent of the owner to forego all future conforming uses of the property"). A future intent to use the property is sufficient; nonuse does not demonstrate the requisite intent merely because the activation of the easement would produce no immediate benefit sufficient to justify the necessary expenses. Gerhard, 68 C.2d at 893. If an easement is abandoned, the interest reverts to the servient estate from which the easement was carved. Id. at 887.

The following facts regarding the use of the disputed right of way are not contested: The City removed the railroad track from the land sometime during the 1950's for economic reasons. This property has not been used as a transportation road or any other purpose since that time; the nearest portion so used is roughly two miles away from the plaintiffs' parcel. The City does not dispute that "San Francisco has no foreseeable use for that portion of the right of way which goes over the Ziomek property and considers that portion of the right of way through the Ziomek property to service any part of the Hetch Hetchy project." The City acknowledged in open court that is only interest is to sell whatever interest it has in the property.

The City has granted a revocable permit to the Groveland Community Services District, for a sewer main serving Big Oak Flat, that runs the length of the right of way over the plaintiffs' parcel. A six inch water main crosses the parcel at its western end. The City conveyed other portions of the Hetch Hetchy Railroad right of way, not on the land of plaintiffs, to the town of Groveland for use as a community party; prior to that sale, the City evaluated whether it would continue to have access to land near the plaintiffs' property. In 1987, the City determined that the right of way running over the plaintiffs' parcel was surplus, and contemplated selling other surplus parcels in fee to private purchasers.

The parties dispute the amount of maintenance that the City has performed on the right of way on plaintiffs' property since 1985, but agree that it has been performed at least three times since 1980. The fences are currently in a state of disrepair.

"The intention required in the abandonment of an easement is the intention not to make in the future the uses authorized by it." Faus, 67 C.2d at 363; see also Tract Development Service, 246 Cal. Rptr at 477 ("Abandonment hinges on the intent of he owner to forego all future conforming uses of the property"). The Raker Act, passed after the San Francisco earthquake, was intended to permit access to the water within the Hetch Hetchy Valley. City of Palo Alto v. City and County of San Francisco, 548 F.2d 1374, 1376 (9th Cir. 1977). The City's concession that it has no future use of

the property for access to the Hetch Hetchy project is determinative that an intent to abandon exists. Ocean Short R.R. Co. v. Doelger, 179 Cal. App. 2d 222, 233, 3 Cal. Rptr. 706 (1960). The property has not been used for that purpose for approximately forty years. The only current use of the property claimed by plaintiff is by Groveland Community Services District, for a water and sewer line. These uses do not conform to the easement's purpose. See Faus, 67 Cal.3d at 364 & n.12 (easement deemed abandoned where dominant owner has requisite intent and use is inconsistent to the original grantor's intent).

The undisputed facts establish abandonment by the City of the land for right of way or railroad purposes as a matter of law. The plaintiffs' motion for summary judgment will be granted.

2) Forfeiture under the Raker Act

Section 6 of the Raker Act prohibits the City from selling, assigning or transferring the easement, and that the attempt to do so results in a reversion to the United States. The plaintiffs argue that the City's revocable permit to the Groveland Community Services District should result in a forfeiture of the City's right of way across their land.

The Ninth Circuit has held that private citizens cannot enforce section 6 of the Raker Act. Starbuck v. City and County of San Francisco, 556 F.2d 450 (9th Cir. 1977). Because "the Raker Act's administration depends on the finely-tuned interplay of the Secretary's discretion

and balance of state and federal control over the use of Hetch Hetchy water and power," the court determined that citizen involvement was not intended. Id. at 453. The court further noted that "An eleventh hour amendment offered by Representative Mondell, an opponent of the bill, which would have given 'any party in interest' a right to enforce the Act was rejected with little debate". Id. at 455; compare City of Palo Alto v. City and County of San Francisco, 548 F.2d 1374 (9th Cir. 1977) (cities and water districts may bring suit as "co-grantees" under the Raker Act).

At oral argument, plaintiffs' counsel conceded that the direct beneficiary of the reversionary interest, the United States, is the only party with standing to assert the forfeiture claim. The plaintiffs then abandoned this forfeiture claim. The United States is no longer a party; this claim need not be further considered.

e) Declaratory Relief

The plaintiffs' First Amended Complaint asks for a declaration that the City has no interest in the plaintiffs' parcel, and to cancel the 1916 deed as invalid. For the reasons stated in this and the May, 1993 Order, it is ORDERED that the City has no right in or to the plaintiffs" 140 acre parcel. Section 3 of the Raker Act permitted Elias Martinez to relinquish his priority rights to an easement interest in the disputed property by the 1916 deed; the 1916 deed cannot be canceled.

At oral argument, the City asked that the rights of the Groveland Community Services District be determined on the present motions. At oral argument, the plaintiffs conceded that both they and their predecessors-in-interest were aware of the water and sewer mains on the property, and did not object to their existence on the land. The plaintiffs conceded that they were estopped from seeking removal of the pipes. Based on that admission, it can be determined that the plaintiffs assert no right to the Groveland Community Services District sewer or water lines that underlie plaintiffs' property. The rights regarding the Groveland Park land need not be considered as that land is not located on the plaintiffs' property.

The City asked that the rights of ownership to the mining claims be determined. In the first cross-motions for summary judgment, the plaintiffs did not dispute that on June 19, 1919, Elias Martinez relinquished all portions of his homestead entry that were in conflict with the ownership of mining claims by those who opposed his proof of patent application. Based on this admission, the plaintiffs, as successors-in-interest to Elias Martinez's widow, have no rights to those mineral interests in the subject property.

CONCLUSION

For the reasons stated in the foregoing discussion:

1) The plaintiffs' motion for summary judgment is GRANTED in part;

2) The City's motion for summary judgment is DENIED;

3) Judgment shall be entered in favor of the plaintiff, that defendant City and County of San Francisco has no further interest in the property that is the subject of this dispute. Plaintiffs' counsel shall lodge with the court within five (5) days, a judgment in conformity with this opinion.

IT IS SO ORDERED.

/s/ Oliver W. Wanger
Oliver W. Wanger
United States
District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN ZIOMEK, ROBERT A. TOMEI; DAVID S. MANA; JEFFREY J. GOTELLI; Plaintiffs, vs. CAROLYN J. JENKINS, CASILDA JENKINS HALL, WARD A. HEUER, CITY AND COUNTY OF SAN FRANCISCO, JOHN ENGVALL, and FIRST AMERICAN TITLE, a California Corporation, UNITED STATES OF AMERICA, Defendants.	No. CVF 92-5168 OWW

JUDGMENT

(Lodged January 28, 1994)
(Entered February 2, 1994)

This cause came on for hearing before this Court on January 10, 1994, upon motion of Defendant City and County of San Francisco for summary judgment and upon cross-motion of Plaintiffs, JOHN ZIOMEK, ROBERT A.TOMEI, DAVID S. MANA and JEFFREY J. GOTELLI, for summary judgment, the Honorable Judgment Oliver W. Wanger

presiding. Joseph P. Nieman appeared as attorney for Plaintiffs. Joshua D. Milstein appeared as attorney for Defendant. This Court has carefully considered the motions, the affidavits, the exhibits, the pleadings, and the memoranda in support of an in opposition thereto. The issues were heard and an order granting summary judgment has been duly made.

Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment quieting title against Defendants City and County of San Francisco;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Elias Martinez had the right to sell his interest in the property to San Francisco pursuant to Section 3 of the Raker Act. The 1916 Deed of Right of Way from Elias Martinez to City and County of San Francisco, recorded March 10, 1916 in Book 78, Page 206 of Official Records in the Office of the County Recorder of Tuolumne County was a valid deed and cannot be cancelled as requested by Plaintiffs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are not estopped from asserting any interest in the property purchased by the City and County of San Francisco from Elias Martinez in 1916 under principles of homestead relinquishment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Deed of Right of Way from Elias Martinez to City and County of San

Francisco, recorded March 10, 1916 in Book 78, Page 206 of Official Records in the Office of the County Recorder of Tuolumne County conveyed only an easement pursuant to the terms of the Raker Act and for the purposes stated therein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the easement has been abandoned by the City and County of San Francisco and that City and County of San Francisco has no interest in the ZIOMEK property, described as follows:

> Parcel A as shown on that certain Parcel Map filed in the Office of the County Recorder of Tuolumne County, California on May 18, 1987 in Volume 24, Page 55 of Parcel Maps.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs have no private cause of action to enforce a forfeiture under Section 6 of the Raker Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are estopped from seeking removal of water and sewer lines on their property which are owned by the Groveland Community Services District (GCSD).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party has any interest in Good Luck and Pipe Dream quartz mine claims adjacent to the Plaintiffs' property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs shall file a Costs Bill pursuant to Local Rule 292 and 28

U.S.C. Section 1920, et seq. within ten (10) days after entry of judgment.

/s/ Oliver W. Wanger
Oliver W. Wanger
United States
District Judge

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ZIOMEK, ROBERT A. TOMEI; DAVID S. MANA; JEFFREY J. GOTELLI; Plaintiffs-Appellants, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellant.	No. 94-15360 D.C. No. CV-92-05168-OWW

ORDER

(Filed November 6, 1995)

Before: FLETCHER, POOLE, AND O'SCANNLAIN, Circuit Judges.

Appellees' petition for rehearing is DENIED.